UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORPORATION,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 2:06-CV-72-DF
v.	§	
	§	JURY TRIAL DEMANDED
WELLS FARGO & COMPANY, et al.	§	
	§	
Defendants.	§	

DEFENDANT FIRST CITIZENS BANCSHARES, INC.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, OR IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM OR FOR A MORE DEFINITE STATEMENT

Defendant First Citizens BancShares, Inc. ("First Citizens BancShares") moves pursuant to Federal Rule of Civil Procedure 12(b)(2) to dismiss Plaintiff DataTreasury Corporation's ("DataTreasury's") claims against First Citizens BancShares for lack of personal jurisdiction. Should the Court deny this motion to dismiss for lack of personal jurisdiction, First Citizens BancShares moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss DataTreasury's claims against First Citizens BancShares for failure to state a claim upon which relief may be granted and, in the alternative, moves pursuant to Federal Rule of Civil Procedure 12(e) for a more definite statement of DataTreasury's claims. In support of the latter request for relief, First Citizens BancShares adopts the Joint Motion of Defendants to Dismiss, or in the Alternative, for More Definite Statement, filed on June 1, 2006 (Docket No. 80), by the

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codefendants listed below.[1] The balance of this motion discusses First Citizens BancShares's entitlement to dismissal for lack of personal jurisdiction.

I. INTRODUCTION

First Citizens BancShares is a non-resident holding company that conducts no business and sells no services or products in Texas. First Citizens BancShares lacks the "minimum contacts" with Texas that the law requires to justify the exercise of personal jurisdiction over a non-resident. Accordingly, all of the claims against First Citizens BancShares must be dismissed.

II. BACKGROUND

DataTreasury alleges that First Citizens BancShares has been and is infringing United States Patents Nos. 5,910,988, 6,032,137, 5,265,007, and 5,717,868 (collectively, the "Asserted Patents") by "making, using, selling, offering for sale, and/or importing in or into the United States, directly, contributory [sic], and/or by inducement, without authority, products and services that fall within the scope of the claims of" the Asserted Patents. Complaint at ¶¶ 73, 77, 81, and 87. To support personal jurisdiction over First Citizens BancShares, DataTreasury alleges that First Citizens BancShares "does business in Texas"; has "sufficient minimum contacts with the forum as a result of business conducted within the State of Texas and within this [D]istrict"; engages in conduct including "making, using, selling, offering to sell, and/or importing, directly, contributorily, and/or by inducement, infringing products and services within the State of Texas and within this [D]istrict"; has "provided services and sold products in this

[1] The Joint Motion of Defendants to Dismiss, or in the Alternative, for More Definite Statement, filed on June 1, 2006 (Docket No. 80), was filed by the following codefendants: Bank of America Corporation; Bank of America, N.A.; Bank of New York Co, Inc.; Bank of Tokyo-Mitsubishi UFJ, Ltd.; BB&T Corporation; Branch Banking and Trust Company; Citizens Financial Group, Inc.; Comerica Bank & Trust, N.A.; Comerica, Inc.; Cullen/Frost Bankers, Inc.; Deutsche Bank Trust Company Americas; First Data Corporation; LaSalle Bank Corporation; LaSalle Bank, N.A; M&T Bank Corporation.; M&T Bank; Remitco, LLC; TeleCheck Services, Inc.; The Bank of New York; The Frost National Bank; UBS Americas, Inc.; Union Bank of California, N.A.; Wachovia Bank, N.A.; Wachovia Corporation; Wells Fargo & Company; and Wells Fargo Bank, N.A.

District separately and with or for other infringing companies which are or were Defendants in related pending litigation" in this District; engages in "infringing activities with relation to the products and services of Small Value Payments Co., LLC and The Clearing House Payments Company, LLC"; "operate[s] a nationwide check image archive and exchange service that operates in or through this District"; and has "authorized, participated in, or facilitated transactions occurring in whole or in part within this District that, in whole or in part, infringe" the Asserted Patents. *Id.* at ¶ 41, 60, 65.

DataTreasury's jurisdictional allegations are incorrect and unsupported. First Citizens BancShares is a holding company that holds stock in a number of companies. Declaration of John Gray at ¶ 3, attached as Exhibit A. First Citizens BancShares has not and does not, on behalf of itself, its subsidiaries, or any other persons or entities, offer for sale, sell, advertise or provide any document, receipt, or check imaging or processing services to any customers in Texas or elsewhere. *Id.* First Citizens BancShares does not own any patents *Id.* at ¶ 5.

Moreover, First Citizens BancShares conducts no business in Texas and directs none of its activities toward residents of Texas. *Id.* at ¶ 12. First Citizens BancShares is incorporated and organized under the laws of the State of Delaware, and maintains its principal place of business in Raleigh, North Carolina. *Id.* at ¶ 2. It does not maintain a place of business in Texas, nor has it ever maintained a place of business in Texas. *Id.* at ¶ 7. It is not licensed or otherwise authorized to do business in Texas, nor has it ever been licensed or otherwise authorized to do business in Texas. *Id.* at ¶ 8. It does not have assets, employees, or agents in Texas, nor has it ever had assets, employees, or agents in Texas. *Id.* at ¶ 9. First Citizens BancShares does not manufacture goods, distribute products, or provide services in Texas. *Id.* at ¶ 10. Nor does it pay franchise or any other taxes to the State of Texas. *Id.* at ¶ 11. In short, First Citizens

BancShares conducts no business in Texas and directs none of its activities toward residents of Texas. *Id.* at ¶ 12.

As a holding company, First Citizens BancShares holds stock in a number of companies. *Id.* at ¶ 3. But all of First Citizens BancShares's subsidiaries – regardless of the use of "First Citizens" in their names – are separate and distinct from First Citizens BancShares. First Citizens BancShares has its own board of directors and officers. *Id.* at ¶ 6. First Citizens BancShares maintains books and bank accounts separate from its subsidiaries. *Id.* Similarly, its subsidiaries maintain books and bank accounts separate from First Citizens BancShares. *Id.* Furthermore, all of First Citizens BancShares's operating subsidiaries operate with sufficient capital to conduct day-to-day operations. *Id.*

III. ARGUMENT

DATATREASURY'S CLAIMS AGAINST FIRST CITIZENS BANCSHARES MUST BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

A. DataTreasury Bears the Burden of Establishing Personal Jurisdiction.

Once a defendant challenges personal jurisdiction, the plaintiff bears the burden of producing facts that support the existence of jurisdiction. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Patent Incentives, Inc. v. Seiko Epson Corp.*, No. 89-1087, 878 F.2d 1446, 1989 WL 59272, at *1 (Fed. Cir. June 7, 1989); *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996).[2]

B. Personal Jurisdiction Analysis Focuses on Due Process.

Generally speaking, a plaintiff must make two showings to establish personal jurisdiction over a non-consenting, non-resident defendant. *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266, 1269-70 (Fed. Cir. 1998). First, it must show that a statute makes the defendant

[2] In patent infringement cases, Federal Circuit law governs determinations of personal jurisdiction. *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358 (Fed. Cir. 1998).

amenable to process. *Id.* This determination typically turns on whether a state court in the forum at issue could assert jurisdiction over the defendant under the forum state's long-arm statute.

Second, maintenance of the suit in the forum at issue must be consistent with traditional notions of fair play and substantial justice embodied in the Due Process Clause of the United States Constitution. *Dainippon*, 142 at 1269-70; *International Shoe Co. v. Washington*, 326 U.S. 310, 316-20 (1945). The Due Process Clause poses two requirements for the proper assertion of personal jurisdiction: (1) the non-resident must have some "minimum contacts" with the forum that results from an affirmative act on its part such that the non-resident defendant could anticipate being haled into the courts of the forum state; and (2) it must be fair or reasonable to require the non-resident to defend a suit in the forum such that the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice. *International Shoe*, 326 U.S. at 316-20; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77 (1985); *LSI Indus. Inc., v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1374-75 (Fed. Cir. 2000); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 335 (5th Cir. 1999).

The Texas long-arm statute extends as far as the United States Constitution allows. Tex. Civ. Prac. & Rem. Code Ann. 17.042 (West 1997); *Gundle Lining Constr. Corp.*, 85 F.3d at 204. In this situation, the personal jurisdiction analysis folds into one question: whether the exercise of personal jurisdiction would violate the Due Process Clause of the United States Constitution. *See, e.g.*, *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1307 (Fed. Cir. 1999); *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1377 (Fed. Cir. 1998).

C. First Citizens BancShares Does Not Have Minimum Contacts with Texas.

To establish "minimum contacts," DataTreasury must show that First Citizens BancShares is subject to either specific jurisdiction or general jurisdiction. *LSI Indus.*, 232 F.3d at 1374-75; *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 214-15 (5th Cir. 2000). In either case, DataTreasury must show that First Citizens BancShares has purposefully directed activities at the forum or its residents. A defendant will not be haled into a jurisdiction solely as a result of "'random,' 'fortuitous,' or 'attenuated' contacts, . . . or of the 'unilateral activity of another party or a third person.'" *Burger King*, 471 U.S. at 475 (citations omitted).

1. First Citizens BancShares Has No Contacts with Texas to Support General Jurisdiction.

General jurisdiction exists when the non-resident's contacts with the forum state are "continuous and systematic," even if the cause of action has no relation to those contacts. *LSI Indus.*, 232 F.3d. at 1375; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-416 (1984). The plaintiff must establish a substantial connection between the non-resident defendant and the forum state. *See, e.g., McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

First Citizens BancShares does not have continuous and systematic contacts with Texas. First Citizens BancShares is a Delaware corporation with its principal place of business in Raleigh, North Carolina. Dec. of John Gray at ¶ 2 (Exhibit A). First Citizens BancShares does not maintain a place of business in Texas, nor has it ever maintained a place of business in Texas. *Id.* at ¶ 7. It is not licensed or otherwise authorized to do business in Texas, nor has it ever been licensed or otherwise authorized to do business in Texas. *Id.* at ¶ 8. It does not have assets, employees, or agents in Texas, nor has it ever had assets, employees, or agents in Texas. *Id.* at ¶ 9. First Citizens BancShares does not manufacture goods, distribute products, or provide services in Texas. *Id.* at ¶ 10. Nor does it pay franchise or any other taxes to the State of Texas. *Id.* at ¶ 11. In short, First Citizens BancShares conducts no business in Texas and directs none of its activities toward residents of Texas. *Id.* at ¶ 12. First Citizens BancShares thus lacks even "random," "fortuitous," or "attenuated" contacts with Texas, which, even if they existed, would still be insufficient to assert personal jurisdiction over the company. Moreover, DataTreasury cannot, under any circumstances, show that First Citizens BancShares has had continuous and systematic contacts with Texas.

DataTreasury cannot rely on the activities of First Citizens BancShares's subsidiaries to support jurisdiction over First Citizens BancShares. Those subsidiaries are separate and distinct from First Citizens BancShares. First Citizens BancShares observes all corporate formalities. *Id*. at 6. It is hornbook law that facts relating to a holding company's subsidiaries cannot establish personal jurisdiction over the holding company itself. *See Phonometrics, Inc., v. Northern Telecom Inc.*, 133 F.3d 1459, 1463, 1468 (Fed. Cir. 1998); *Alpine*, 205 F.3d at 218 (noting that a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there and that the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 856 (5th Cir. 2000) (noting that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other); *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648, 653-7 (N.D. Tex. 2000) (applying Federal Circuit law and granting motion to dismiss a parent company for lack of personal jurisdiction).

2. First Citizens BancShares Has No Contacts with Texas to Support Specific Jurisdiction.

Specific jurisdiction over a non-resident defendant exists when the defendant has purposefully directed its activities at the forum state and "the litigation results from alleged injuries that arise out of or relate to those activities." *Akro Corp. v. Luker,* 45 F.3d 1541, 1545 (Fed. Cir. 1995) (quoting *Burger King,* 471 U.S. at 472). To determine if minimum contacts exist for specific jurisdiction, the Federal Circuit examines (1) whether the defendant purposefully directed its activities at residents of the forum, and (2) whether the plaintiff's claim arises out of or relates to those activities. *See 3D Systems, Inc.*, 160 F.3d at 1378.

As discussed, First Citizens BancShares conducts no business in Texas and directs none of its activities toward residents of Texas. Dec. of John Gray at ¶ 12 (Exhibit A). In particular, First Citizens BancShares, Inc. has not and does not, on behalf of itself, its subsidiaries, or any other persons or entities, offer for sale, sell, advertise or provide any document, receipt, or check imaging or processing services to any customers in Texas or elsewhere. *Id.* at ¶ 4.

Since First Citizens BancShares does not provide any document, receipt, or check imaging or processing services to any customers, and since First Citizens BancShares conducts no business at all in this jurisdiction, DataTreasury cannot show that First Citizens BancShares purposefully directed its activities at Texas residents. DataTreasury's cause of action cannot arise out of First Citizens BancShares's conduct in this forum because First Citizens BancShares has not directed any activities at residents of this forum.

D. The Assertion of Jurisdiction Is Not Fair and Reasonable.

Given the absence of both general and specific jurisdiction over First Citizens BancShares in Texas, this Court need not consider whether the assertion of jurisdiction comports with traditional principles of fair play and substantial justice. *See Burger King*, 471 U.S. at 476; *Nutrition Physiology Corp.*, 87 F. Supp. 2d at 651 ("Only if the nonresident defendant purposefully establishes minimum contacts with the forum state does the court consider whether maintenance of the suit comports with traditional notions of fair play and substantial justice."). For the reasons given above, however, there is nothing reasonable about haling First Citizens BancShares – a Delaware corporation with no minimum contacts with Texas – into the Eastern District of Texas to confront a lawsuit.

IV. CONCLUSION

DataTreasury cannot establish that personal jurisdiction exists over First Citizens BancShares in the Eastern District of Texas. As a result, this Court should dismiss DataTreasury's claims against First Citizens BancShares. Should the Court deny this motion to dismiss for lack of personal jurisdiction, the Court should dismiss DataTreasury's claims against First Citizens BancShares for failure to state a claim upon which relief may be granted or, in the alternative, order DataTreasury to provide a more definite statement describing the allegations against First Citizens BancShares in reasonable detail sufficient to identify the accused products or systems.

Respectfully submitted,

/s/ Larry D. Carlson

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CERTIFICATE OF SERVICE

I certify that on the 1st day of June, 2006, all counsel who are deemed to have consented to electronic service are being served with a copy of this document by the Court's Electronic Filing System, pursuant to Local Rule CV-5(a)(3)(A).

/s/ Larry D. Carlson
Larry D. Carlson